would probably be held a trespasser. The conditions must be comparatively weighty to warrant an entry. The individualistic principles of the common law, summed up in "Every man's home is his castle" and "privacy," still remain. But the seriousness of the occasions and these maxims are to be considered in deciding whether the defendant's entry was sanctioned by the customs of the community.

The instant case falls into the second category of our classification. The fact that the source of the plaintiff's danger was the defendant's tree clearly authorized the defendant to enter and remove the branch, unless the plaintiff objected. There was no allegation that he did so. The strength of this defense is indicated by the social usage which usually results in a request to the defendant to remove the branch, though no one would argue that he could legally be compelled to do it.

NEGOTIABILITY OF THE STIPULATION FOR ATTORNEY'S FEE IN BILLS AND NOTES.—Is the stipulation in a negotiable bill or note[1] for the payment of an attorney's fee[2] as enforceable by a holder in due course as is the main engagement? This point, which is novel in the sense that the courts have rarely regarded it from the standpoint of the negotiability of the provision itself, has arisen in the recent case of *Butler Bros.* v. *Dunsworth* (Tex. Civ. App. 1921) 233 S. W. 311. The payee acquired the notes from the maker by fraud and indorsed them to the plaintiff without notice as collateral security for a debt contemporaneously created. In an action against the maker on the note for the amount of the payee's debt the court allowed the plaintiff to recover, in addition, the attorney's fee stipulated for in the note, over the objection of the defendant who relied on the rule that a pledgee in enforcing payment of the collateral note cannot recover more than the total amount of his debt and interest. The court correctly disposed of this argument by saying that the general language of the doctrine does not apply to the case of the attorney's fee but refers rather to the fact that the pledgee may not recover the full amount of the notes if it exceeds his debt. The defendant apparently failed to urge specifically upon the court the much stronger ground that the stipulation, unlike the main engagement to pay money, was non-negotiable and subject to the defense of fraud in the hands of the plaintiff. It is settled law that a pledgee-indorsee receiving negotiable paper without notice before maturity as collateral security for a debt which is contemporaneously contracted is a holder in due course[3] to the extent of his debt. Hence the same problem is presented here as in the case of the purchaser-transferee. The controversy in which the various jurisdictions engaged over the question whether the insertion of a stipulation for an attorney's fee destroyed the negotiability of the note itself, culminated in the provision in the Negotiable Instruments Law[4] that the instrument was not thereby made uncertain as to amount; but this section does not deal with the negotiability or enforceability of the stipulation.[5]

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[1] Most of the cases cited are those of promissory notes because the stipulation for an attorney's fee appears more frequently in notes than in bills, but the same principle applies to both.

[2] It is assumed, of course, that the provision is not one which the court would refuse to enforce even in the hands of a payee because it is void as a penalty or for usury.

[3] *American Nat'l. Bank* v. *Minor & Son* (1911) 142 Ky. 792, 135 S. W. 278; *Burns* v. *New Mineral Fertilizer* (1914) 218 Mass. 300, 105 N. E. 1074; N. I. L. §§ 52, 90.

[4] N. I. L. § 2 (5).

[5] Thus where it was invalid before the act as a penalty or usurious, it re-

The cases generally support the view that a holder in due course may recover the attorney's fee, but seldom has the question of negotiability been raised squarely. A few courts have actually decided that the stipulation passes with the instrument to the transferee, and hence that the indorsee may recover the fee not only from the maker,[6] but also from the indorser,[7] and from the acceptor of a bill.[8] In many cases, where the main question was whether the provision made the note non-negotiable, the courts allowed the transferee to recover the fee, including the case where he was a pledgee,[9] but without making any point of it.[10] Likewise, in the identical problem of costs of collection, the courts in most of these cases allowed a recovery of them, where the note so provided, without raising the question. An analogous doctrine bears out the correctness of this position. It is generally held that the indorsement of a negotiable note to a holder in due course carries with it the mortgage security and the assignee of the mortgage taking it in good faith before maturity holds free from any equities existing between the original parties to the mortgage.[11] The stipulation for an attorney's fee, like the provision for mortgage security, is incidental to the main promise, in the nature of security, and of no force until the note has been dishonored. Another, though less cogent, analogy presents itself in those cases where the transferee is permitted to enforce a retroactive provision for a higher rate of interest from the date of the note if it is unpaid at maturity; but here again the court's attention has been directed toward deciding that the note is negotiable.[12] Such a provision, like that for an attorney's fee, does not take effect until maturity and at that time the note is non-negotiable.

On the other hand, a strong case can be made out on principle against the negotiability of such a provision. When A promises to pay on a specified date to B or order $100 and an attorney's fee if the note has to be placed in the hands of an attorney for collection, he incurs two obligations. The law, in pursuance of the policy to promote the free passage of the "courier without luggage," has made the promise to pay $100 negotiable. But is not the promise to pay an attorney's fee a mere chose in action like any other contract right? Thus Professor Ames, with that dislike for the assignee which is characteristic of a student of the older common law, has stated that as regards the incidental provision for the fee, the transferee of the note is the assignee of a chose in action and takes subject to all defenses valid against the payee.[13] Besides, the

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mains so. *Mechanics'-American Nat. Bank* v. *Coleman* (C. C. A. 1913) 204 Fed. 24; *Raleigh Co. Bank* v. *Poteet* (1914) 74 W. Va. 511, 82 S. E. 332.

[6] *Adams* v. *Addington* (C. C. 1883) 16 Fed. 89; *Dorsey* v. *Wolff* (1892) 142 Ill. 589, 32 N. E. 495.

[7] *Hubbard* v. *Harrison* (1871) 38 Ind. 323; *Bank of British North America* v. *Ellis* (C. C. 1880) 2 Fed. 44. This case took the position that at common law the attorney's fee was collectible as a part of his costs, and that the stipulation was a substitute for that. But this argument was not directed to the enforcement of the provision in the note.

[8] *Smith* v. *Muncie Nat. Bank* (1867) 29 Ind. 158; see also 1 Daniel, *Negotiable Instruments* (5th ed. 1903) § 62 (a) to the effect that the stipulation becomes a part of the acceptor's and indorser's contract and the fees are recoverable by the holder.

[9] *Winn Parish Bank* v. *White Sulphur Lbr. Co.* (1913) 133 La. 282, 62 So. 907.

[10] *Stocking* v. *Moury* (1907) 128 Ga. 414, 57 S. E. 704; *Keenan* v. *Blue* (1909) 240 Ill. 177, 88 N. E. 553; *Lanier* v. *Jones* (1911) 104 Tex. 247, 136 S. W. 255; *McCornick* v. *Swem* (1909) 36 Utah 6, 102 Pac. 626.

[11] *Carpenter* v. *Longan* (U. S. 1872) 16 Wall. 271; *Crawford* v. *Aultman* (1897) 139 Mo. 262, 40 S. W. 952; *Thorpe* v. *Mindeman* (1904) 123 Wis. 149, 101 N. W. 417; Jones, *Mortgages* (7th ed. 1915) § 834.

[12] *Clark* v. *Skeen* (1900) 61 Kan. 526, 16 Pac. 327; *Hope* v. *Barker* (1892) 11 Mo. 338, 20 S. W. 567; *Crump* v. *Berdan* (1893) 97 Mich. 293, 56 N. W. 559.

[13] 2 Ames, *Cases on Bills and Notes* (1881) 830, Index and Summary. No

courts, when anxious to establish the negotiability of the note, have argued that the stipulation is by its nature inoperative until maturity and at that moment the note has ceased to be negotiable,[14] thus making the transferee an assignee. The application of this type of reasoning would destroy the negotiability of the provision. That the courts have often regarded the promise to pay an attorney's fee as distinct from the main engagement would seem to follow from their discussion of it as a contract of indemnity,[15] or of the necessity for a consideration for it,[16] or of the need of a separate action to recover the fee,[17] or of the fact that it is incidental and refers only to the remedy;[18] yet in most of these cases the holder was allowed to recover, and so this, as an argument for non-negotiability, is weakened, if not nullified. The authority for the view of non-negotiability seems limited to a thin line of cases in one jurisdiction,[19] which apparently would not be followed there.[20]

In this type of question where the law is so bound up with, and controlled by, commercial policy, practical considerations from the business standpoint would doubtless prevail over academic arguments founded on logic and authority, particularly where the cases, as here, are so sparse in treatment of the particular point involved. But no overwhelming policy seems to dictate itself on either side. It might be urged that we ought not to penalize a defrauded maker any more than necessary but should distribute the loss to this slight extent. On the other hand, this stipulation is a representation to every holder on which he reasonably relies for his protection. The maker agrees to pay an attorney's fee in event of dishonor, and it ought to make no difference to him to whom he pays it. And the holder as a rule does not split up the instrument into its various obligations but, by the fairer inference takes into account all the beneficial provisions in estimating the value of the instrument. Hence allowing the transferee to recover the attorney's fee promotes the currency of the instrument by the added attraction of the indemnity against expense in recovering its face value. This fact, coupled with what authority there is, makes the view that the stipulation is negotiable, the more desirable conclusion and the one more likely to be reached by the courts.

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cases are cited for the view that the incidental agreement to pay an attorney's fee is non-negotiable and subject to all defenses.

[14] See *Second Nat. Bank of Colfax* v. *Anglin* (1893) 6 Wash. 403, 404, 33 Pac. 1056; see *Dorsey* v. *Wolff, supra,* footnote 6, p. 595.

[15] See *First Nat. Bank of Eagle Lake* v. *Robinson* (1911) 104 Tex. 166, 167, 135 S. W. 372; *Florence Oil & Refining Co.* v. *Hiawatha Co.* (1913) 55 Colo. 378, 382, 135 Pac. 454. Thus Daniel, *loc. cit.,* says that the stipulation is incidental and ancillary to the main engagement, intended to assure its performance.

[16] See *Peyser* v. *Cole* (1884) 11 Ore. 39, 44, 4 Pac. 520; *Keenan* v. *Blue, supra,* footnote 10, p. 187.

[17] See *Dearlove* v. *Edwards* (1897) 166 Ill. 619, 622, 46 N. E. 1081. The chief reason seems to be that the attorney eventually gets the fee and not the holder, although the court says it is not due at the time of the first action.

[18] See *Second Nat. Bank of Colfax* v. *Anglin, supra,* footnote 14, p. 405; *Stapleton* v. *Louisville Banking Co.* (1895) 95 Ga. 802, 803, 23 S. E. 81.

[19] *Ware* v. *City Bank of Macon* (1876) 59 Ga. 840; *Rogers* v. *Hamilton* (1873) 49 Ga. 604. The court felt that the attorney's fee was not a part of the contract to pay money but of the contract that the plaintiff should have a lien on the crop as provided in the note.

[20] *Cf. Stocking* v. *Moury, supra,* footnote 10.